

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

**JANA BURCH, GARY BULLIS
and JEROME BURKE,**
individually and on behalf of all
Citizens of Virginia Similarly Situated,

Plaintiffs,

v.

Case No. 3:11-cv-256

**VIRGINIA BOARD OF ELECTIONS,
CHARLES JUDD, KIMBERLY BOWERS,
and DON PALMER,**
in their official capacities,

Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' RULE 12(b)
MOTIONS TO DISMISS**

1. The complaint was filed on April 19, 2011 together with a motion to convene a three judge court. (Docs. 1 and 2).
2. The time in which to answer or otherwise respond has not expired.
3. The theory of the complaint as stated in Count I is that the Virginia General Assembly is mal-apportioned in light of the 2010 census, that the General Assembly will not pass legislation to reapportion itself in accordance with the census, and that Defendants intend to conduct the 2011 elections within the old lines.
4. The theory of the complaint as stated in Count II is substantially the same, as applied to Virginia's congressional seats.

5. It is a matter of public record that the General Assembly passed, and the Governor signed into law, HB5005 redistricting the General Assembly in light of the 2010 census. <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=112&typ=bil&val=HB5005>
6. Any claim that HB5005 will not receive timely preclearance would be entirely speculative.
7. There is ample time for the General Assembly to redistrict Virginia's congressional seats this year in special session and the General Assembly intends to do so.

RULE 12(b)(1)

8. On April 29, 2011, the United States District Court for the Western District of Virginia dismissed a suit directed against the Virginia Senate elections based upon the same theory as asserted in this case. (Case No. 3:11-cv-00030-NKM Doc. 11).
9. In doing so, that court found a want of jurisdiction because the claims are too speculative and too dependent on subsequent contingencies to give rise to an Article III case or controversy.
10. That is likewise the case here.
11. Furthermore, because the Virginia State Board of Elections has been sued *eo nomine* in federal court, this case is barred against that defendant by the Eleventh Amendment and related doctrines of sovereign immunity. *Libertarian Party of Virginia v. Virginia State Bd. of Elections*, No. 1:10-

cv-615, 2010 U.S. Dist. LEXIS 97177 (E.D. Va. Sept. 16, 2010) (noting the inapplicability of *Ex Parte Young* to a suit against the State Board of Elections and dismissing it on Eleventh Amendment grounds).

RULE 12(b)(6)

12. The Western District also noted that that suit was subject to dismissal for failure to state a claim because the allegation that defendants intend to conduct 2011 elections within the old lines “does not ‘raise the right to relief above the speculative level,’ and therefore fails to satisfy the ‘plausibility’ standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 555 (2007).” (Case No. 3:11-cv-00030-NKM Doc. 11 at 3-4 n.3).

13. That is likewise the case here.

WHEREFORE, the complaint should be dismissed for want of jurisdiction and for failure to state a claim.

Respectfully submitted,

KENNETH T. CUCCINELLI, II,
Attorney General of Virginia

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia

WESLEY G. RUSSELL, JR.
Deputy Attorney General

STEPHEN R. MCCULLOUGH
Senior Appellate Counsel

/s/ E. Duncan Getchell, Jr.

E. DUNCAN GETCHELL, JR., VSB #14156

Counsel for the Defendants

OFFICE OF THE ATTORNEY GENERAL

900 East Main Street

Richmond, Virginia 23219

Telephone: (804) 786-2436

Facsimile: (804) 786-1991

dgetchell@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2011, I electronically filed the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' RULE 12(B) MOTIONS TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Charles E. Adams, VSB# 37181
ZWERDLING, OPPLEMAN & ADAMS
5020 Monument Avenue
Richmond, VA 23230
Telephone: (804) 355-5719
Facsimile: (804) 355-1597

/s/ E. Duncan Getchell, Jr.
E. DUNCAN GETCHELL, JR., VSB 14156
Counsel for Defendants
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991
dgetchell@oag.state.va.us